In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MERCHANTS PACKING COMPANY, a corporation,

Plaintiff and Appellant,

vs.

NAT ROGAN Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7978

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY,

Plaintiff and Appellant,

vs.

NAT ROGAN Individually and as Collector of Internal Revenue for the Sixth District of California, E. H. COHEE, Individually and as Acting Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7979

UNITED DRESSED BEEF COMPANY, a corporation,

Plaintiff and Appellant,

vs.

NAT ROGAN, Individually and as Collector of Internal Revenue for the Sixth District of California, and GUY T. HELVERING, Commissioner of Internal Revenue,

Defendants and Appellees.

7980

POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

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POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION PENDING APPEAL.

PRELIMINARY STATEMENT.

These points and authorities are submitted jointly on behalf of the above named appellants for the reason that the pleadings, issues and arguments in relation to each are identical and it could serve no useful purpose to submit individual briefs for each appellant. Each point and authority made and cited herein is made and cited on behalf of each of the appellants the same as though each appellant had submitted its individual points and authorities.

Wherever herein the singular is used we respectfully request of the court that it be considered in relation to each of the appellants.

STATEMENT OF CASE.

This is an application for preliminary injunction pending an appeal in the above entitled matter from an order granting defendant's motion to vacate a preliminary injunction theretofore granted.

The history of the case is stated in appellant's application for preliminary injunction pending appeal. It will serve no useful purpose to repeat it here. Suffice it to say that plaintiff after hearing in the court below was granted a preliminary injunction. That thereafter and after this court's decision in the *Fisher Flour Mills v. Vierhaus* case, defendant moved the trial court for an order vacating the preliminary injunction. The court, believing itself bound by this court's decision in the *Fisher Flour Mills* case, granted defendant's motion and dissolved the said injunction. Plaintiff has perfected its appeal to

this court, and pending the hearing on the merits thereof, makes this application, and submits these points and authorities in support thereof.

In this application all the facts alleged in appellant's complaint, amendments thereto, and its supplemental complaint are deemed to be true, there being no affidavits of defendants controverting such facts. Furthermore, for the purpose of the preliminary injunction granted by the trial court the allegations supporting appellant's right to an injunction were found to be true.

The Act Involved.

The Act involved herein is the Agricultural Adjustment Act as amended August 24, 1935.

The pertinent provisions to which we direct the court's attention are:

Section 1. "Declaration of Emergency".

Section 2. "Declaration of Policy".

Section 8. "General Powers of Secretary".

Section 9. (a) to (c) inclusive. "Processing Tax; methods of computation; rate; what constitutes processing; publicity as to tax to avoid profiteering."

Section 15 (d). "Compensating Tax".

Section 11. "'Basic Agricultural Commodity' defined".

Section 12 (a) and (b). "Appropriation; use of revenues derived from taxes; * * *"

Section 13. "Termination of Chapter."

Section 21, (a), (d).

Unconstitutionality of the Act.

The Act here involved is unconstitutional because:

1. It delegates Legislative Power to the Secretary of Agriculture.

Butler, et al. v. United States of America. Decided July 13, 1935, Circuit Court of Appeals, First Circuit. (The *Hoosac Mills* case), II U. S. Law Week 1064;

Schechter Poultry Company v. The United States, 55 Supreme Court Reporter, 837, 79 L. Ed. 888, decided May 27, 1935;

Panama Refining Co. v. Ryan, 293 U. S. 388.

2. The Act is not a Regulation of Interstate Commerce because slaughtering of hogs, growing crops, etc., is intra-state commerce.

Schechter Poultry Company v. The United States, supra;

Coe v. Errol, 116 U. S. 517;

Kidd v. Pearson, 128 U. S. 1;

Chassaniol v. City of Greenwood, 291 U. S. 384.

3. The Processing Tax is not in Reality a Tax.

Bailey v. Drexel Furniture Co., 259 U. S. 20. (Child Labor Tax case);

Penn v. Glenn, Vol. 1, Prentice Hall Tax Service 1935, paragraph 1243;

Loan Association v. Topeka, 20 Wall, 655;

Gebelein v. Milbourne (D. C. of Maryland). Decided August 13, 1935.

4. The Act Violates the Tenth Amendment. The Power Over intra-state business was not delegated to the United States.

Hamer v. Dogenhart, 247 U. S. 251;

Kidd v. Pearson, supra;

Slaughter House Cases, 16 Wall, 36;

Hill v. Wallace, 259 U. S. 44;

Champlin Refining Co. v. Corporation Com., 286 U. S. 210;

Williams v. Standard Oil Co., 278 U. S. 235;

People v. Neblia, 291 U. S. 502;

United States v. Knight, 156 U. S. 1;

Schechter Poultry Co. v. United States, supra.

5. The Act Violates the Fifth Amendment.

Louisville Joint Stock Land Bank v. Radford, 55 S. Ct. Rep. 854;

Railroad Retirement Board v. Alton R. R. Co., 55 S. Ct. 758;

Loan Association v. Topeka, supra;

United States v. Carlyle, 5 App. D. C. 138.

6. The Economic Emergency Does Not Create Power.

Schechter Poultry Co. v. United States, supra;

Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

Appellant's Right to Injunctive Relief.

The appellee, as he has contended throughout this case, will contend that section 3224 R. S. (Sec. 154 Title 26, U. S. C. A.) is a bar to granting an injunction against collection of taxes. But this section means no more than the general principles of equity meant prior to its adoption. 3224 R. S. was and is a mere crystallization of the familiar equity rule that injunctive relief will not be granted where there is an adequate remedy at law or unless the case, as such, finds its footing in "some acknowledged head of equity jurisprudence", as held in *Miller v. Nut Margarine Co.,* 234 U. S. 498. The section means this and nothing more. Any other interpretation might, as in the instant case, nullify the due process clause of the Fifth Amendment. We turn, then, to see whether appellant's suit has its footing in some acknowledged head of equity jurisprudence. We sincerely submit it has.

A. Has Appellant a Plain, Adequate, Speedy, Full and Complete Remedy at Law?

At the outset, we would like to call the court's attention to the case of *Standard Oil Co. v. Atlantic Coast Line R. Co.,* 13 Fed. (2d) 633, 637; Aff. 275 U. S. 257, wherein the court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity."

In the case of *Cable v. U. S. Life Ins. Co.,* 191 U. S. 288, the court said, at page 303:

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy or defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act."

See, also, *Atchison, Topeka & Santa Fe R. Co. v. Sullivan* (C. C. A. 8), 173 Fed. 456, where the court said at page 470 that "The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity", citing several cases.

In *Clark v. Pidgeon River Improvement etc. Co.,* 52 Fed. (2d) 551, at 557, the court said of remedy at law, "That remedy however, must be one that is adequate, speedy, plain and complete, not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation to accomplish the purposes of justice", citing many cases.

See, also, *Walla Walla v. Walla Walla Water Co.,* 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, where the court said at 346 (L. Ed.):

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy

at law, in order to exclude a concurrent remedy at equity must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity", citing cases.

See, also, to the same effect:

Barber v. Barber, 16 L. Ed. 226;

Tyler v. Savage, 143 U. S. 79;

Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct., 594, 32 L. Ed. 1005;

Union Pac. Ry. Co. v. Wild County, 247 U. S. 282, 62 L. Ed. 1110;

Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578, 15 Sup. Ct. 555;

Fredenburg v. Whitney, 240 Fed. 819.

Let us turn now to appellant's remedy at law and see if it is such a remedy as will oust equity of jurisdiction. The remedy at law is found in section 21 of the Act as amended August 24, 1935, and provides:

"Sec. 21. (a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy,

or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

* * * * * * * *

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commis-

sioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial pro-

ceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy."

Appellant alleges in its supplemental complaint and in its application for preliminary injunction before this court, that while it knows it is not passing said tax on, it cannot prove such as a fact. Appellant is a pork processor. The processing tax is levied on the live weight of the hog at the rate of $2.25 per live cwt. Not more than 75 per cent of the live hog is usable in the pork processing business. That 75 per cent is processed into a number of different cuts of meat such as loins, hams, bacon, roasts, shoulders, feet, head, trimmings, casings and numerous others. Some of such cuts are pickled, others smoked, others cured as fresh meat and others are otherwise treated. The length of time it takes to treat such cuts varies. The hog market is a varying one, so that appellant is treating hogs which it has purchased at various prices. Likewise, the treated meat market is a varying one so that appellant sells its treated meat at varying prices. Appellant does not and cannot tell which ham, for example, came from which hog, nor what price appellant paid for the hog from which any particular cut of meat came. Consequently, appellant cannot and does not vary its treated meat price in accordance with the cost of each individual hog from which the individual cuts of meat are taken. Therefore, appellant cannot apportion the processing tax to each individual cut of treated meat to determine whether it has or has not passed such tax or such apportioned part of said tax on.

We have, we believe, demonstrated that Congress has given us a theoretical remedy only, a remedy which is entirely unusable, impracticable and impossible of proof. It has in substance placed a "pot of gold at the end of the rainbow" and informed us that we can have it if we

can find the end of the rainbow and the road leading to it. Such is not a remedy, much less an adequate remedy at law.

There have been two courts which have expressed themselves on this particular question.

In *Baltic Mills Company v. Bitgood,* District Court of the U. S. for the District of Connecticut, Judge Hincks, in granting a temporary injunction, August 28, 1935, said of such proof:

> "The question at once will arise as to how a plaintiff seeking a recovery of a tax illegally exacted of him can establish that he did not pass it on to his vendee. The original authority for such taxes was by Act approved May 12, 1933, 48 Stat. 35. Obviously, a comparison of prices obtaining prior to the original imposition of the tax with the prices obtained in sales made two years later will not show whether a claimant under the Amendment had absorbed the tax or passed it on. Clearly in recovery proceedings neither the commissioner in the first instance nor the Court at a later stage will be bound by what the parties to a sale said or understood with reference to the incidence of the tax. For the Amendment, by its terms, is concerned not with intentions or understandings but rather by acts and their economic effects. Nor am I able to find in the Amendment any suggestion as to whether the incidence of tax is to be determined by the costs of the processor.
>
> If, under the Amendment, a processor seeking a recovery must, in order to establish that he did not pass on the tax, show that his sales were without profit, the Amendment affords no remedy at all to processors who sell at a profit. If, on the other hand, a

processor, through sales at a legitimate profit, opens himself to a suspicion that he has passed on the tax, he will be wholly without evidence to prove the contrary. In short, a processor who sells for the best price he can obtain won't know and can't know himself whether he has absorbed the tax or passed it on. It is thus apparent that the remedy afforded by the Amendment is uncertain. Assume, as the Amendment implies, that a processor *can* absorb the tax, and thus qualify as a meritorious claimant under the Amendment. He is as helpless as his competitor who has passed the tax along, to prove his case.

Moreover, the remedy afforded by the Amendment is cumbersome, involving a multiplicity of issues. To be sure, I should suppose that a claimant under the Amendment would not be precluded in a single proceeding from seeking recovery of taxes accruing in monthly succession. But in order to bring himself within the limitations of the Amendment discussed above he must prove the sale price of 'each article processed from the commodity with respect to which' the tax was imposed; and with respect to each such sale he must locate by proof the incidence of the tax. And if the processor in the course of his manufacture co-mingles some of the processed material with other non-taxable material, after a sale of the articles thus manufactured, he will be confronted with further complications in proving the incidence of the tax."

And in the case of *Armour & Company et al. v. Harrison,* District Court of the United States for the Northern District of Illinois, Eastern Division, in granting a temporary injunction, the court said of such proof:

"Now, I have been considering that proposition ever since I first heard of this. I am not wholly inex-

perienced with the trial of lawsuits, and I am familiar with the way counsel go about proving facts, and for the life of me I can not figure out how a processor, assuming that he sells the pork and sells it for more than the amount of the processing tax, would ever be able to prove he did not pass on the tax. I have not been able to figure that out. I do not think he could. I do not think as a practical proposition he could, so I think these are just words, just words that mean nothing."

We have said that our remedy at law is not adequate because of the impossibility of proof. This court does not have to go that far to determine our right to injunctive relief. It need only determine that it is doubtful and uncertain that appellant could prove its absorption of the tax "to the satisfaction of the Commissioner of Internal Revenue" in order that equity will not refuse jurisdiction. For by such determination, it will by necessity determine, that appellant's remedy at law is not *as* adequate, *as* plain, *as* speedy, *as* full, *as* complete, *as* prompt or as efficient as our remedy in equity to the end that justice shall be attained, in line with the cases cited above.

In *Foster, etc. v. Haydel,* 278 U. S. 13, 14, 73 L. Ed. 147, 154 the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

"If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. Pennsylvania v. West

Virginia, *supra*; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716 726, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremediable loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

Multiplicity of Suits.

We have alleged that unless an injunction is granted there will result between the parties to this suit a multiplicity of suits. This is founded on two theories, (1) That by reason of the processing tax being a monthly tax appellant will have to file a claim for refund for each such monthly tax paid. Each such claim for refund, upon rejection, gives appellant a right of action thereon, against which the statute of limitations starts to run on date of payment. As to each claim for refund appellant will be required to prove it did not absorb the tax paid for that month. It is highly conceivable and probable, assuming the proof possible, that the proof as to such absorption would differ from month to month, thereby necessitating different proof for each such right of action. There would be required a different finding for each such right of refund and therefore an individual record to establish each such right of action. A different and an individual judgment would have to be rendered on each such record.

This court has said of such multiplicity of suits, in *Fisher Flouring Mills Company v. Vierhus* and companion

cases decided August 15, 1935, that such does not constitute multiplicity of suits. The court, after remarking that there is no reference to this point either in the complaint or brief, goes on to discuss it. The court said that appellants could wait a prescribed period, bring one suit with the requisite number of causes of action and recover a lump sum. We respectfully submit that this is an incorrect interpretation of the rule that equity will not enjoin the commission of an act, when at plaintiff's option, he can maintain one suit or a multiplicity of suits. This rule is applied in cases where the plaintiff has a *present* right of action in which, by appropriate pleadings, he can get damages for future wrongs. An example of this is where injury to land by reason of its occupancy for railroad purposes is permanent. In such case plaintiff at his option can maintain multiple suits for continued trespasses or can maintain one suit for damages, both present and future. *Pensacola R. R. Co. v. Jackson,* 21 Fla. 146, 32 Corpus Juris 56.

The multiplicity of suits here involved is not one which can presently be avoided by one suit, but can only be avoided by waiting four years.

The real test for equity taking jurisdiction to avoid a multiplicity of suits is whether the assumption of jurisdiction by equity will *"make for justice". Vandalia Coal Co. v. Lawson,* 87 N. E. 47, 21 C. J. 73, and as further said in that case:

> "The modern, and we believe laudable trend of courts is to abandon the old and technical forms, to abbreviate litigation, to get at the heart of the case and decide it *without delay*—to save time and expense". (Italics ours.)

While we have searched diligently we have found no case squarely in point; that is, no case which decides the question—"Should equity decline jurisdiction because plaintiff by waiting four years can avoid a multiplicity of suits." All of the cases dealing with joinder of causes of action or more correctly stated, avoiding multiplicity of suits, at plaintiff's option are suits in which plaintiff has a present right of action and option.

See 21 *C. J.* 72 *et seq.;*
32 *C. J.* 56 *et seq.*

In *Postal Cable Tel. Co. v. Cumberland T. & T. Co.,* 177 Fed. 726, a telephone company attempted to charge increased rates to a telegraph company. The latter company brought a bill in equity to restrain such increase. HELD—plaintiff entitled to injunction, the court saying at page 734:

> "As to the defendant's argument that the complainant has a plain and adequate remedy at law, I am of the opinion that in view of the continuing nature of the demand made by the defendant and the multiplicity of suits to which complainant would have to resort to enforce its rights, if it should pay the increased rate and sue to recover the same the remedy at law would not be complete and adequate, and equity therefore has jurisdiction. *Donovan v. Pennsylvania Co.* 199 U. S. 279, 304, 26 Sup. Ct. 91, 50 L. ed. 192; *Northern Pac. Ry. Co. v. Lumber Manufacturers Ass'n.* (C. C. A. 9th Circuit), 165 Fed. 1, 91 C. C. A. 39. See also to the same effect Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326, 327 (Okla.)."

In *Hill v. Wallace,* 42 S. Ct. 453, 259 U. S. 44, 66 L. ed. 822, the U. S. Supreme Court held that for the tax payer there to have paid the tax and sued to recover it back would have amounted to a multiplicity of suits. Tho the question of waiting a long period of time and joining many causes of action in one suit was not discussed, the taxpayer there certainly had that option. We know of no internal revenue act which forbids such joinder of causes of action and the court in the *Fisher* case apparently went on the assumption that such was the law.

Sections 156 and 157 of 26 U. S. C. A. on which this court based its conclusion that the appellant in the *Fisher* case could join his 48 actions in one suit and thereby avoid multiplicity of suits were in effect when *Hill v. Wallace* was decided and therefore the plaintiff in that suit had the same opportunity of avoiding multiplicity of suits which this court ascribed to us in the *Fisher* case. See also *Lee v. Bickel,* 292 U. S. 419 where the law under consideration gave the taxpayer the right to pay the tax and sue to recover it back.

(2) The second type of multiplicity of suits to be avoided by the issuance of the injunction herein is relative to the continuous trespasses committed and threatened to be committed. Here the law is well settled that equity will take jurisdiction to settle once and for all the rights of the parties, which at law could only be settled by multiplicity of suits. As alleged in our complaints defendant, through various agents, is and will continue to and has threatened to commit continuous and repeated trespasses against appellant and appellant's property. For each such trespass appellant acquires an independent action at law.

Equity will take jurisdiction to avoid this multiplicity of suits.

32 C. J. 56 et seq.;

Carney v. Hadley, 32 Fla. 344, 14 S. 4;

Warren Mills v. New Orleans Seed Co., 4 S. 298, 7 Am. S. R. 671;

Postal Cable Tel. Co. v. Cumberland Tel. etc. Co., 177 Fed. 729.

Adequacy of Remedy at Law v. Multiplicity of Suits.

Let us consider in the light of the authorities above cited what the result would be if this court should hold there was no multiplicity of suits involved herein because of appellant's ability to wait four years and thereby avoid multiplicity of suits.

To deny appellants an injunction on the ground that there is no multiplicity of suits involved would be tantamount to saying, wait four years for your remedy at law. But to make appellants wait four years for their remedy at law is tantamount to saying, appellants have no adequate remedy at law, for then appellants remedy would not be as prompt, as speedy or as complete as equity can now grant, and under the decisions, equity should assume jurisdiction.

Standard Oil Co. v. Atlantic Coast Line R. Co., supra;

Cable v. N. Y. Life Ins. Co., supra;

Atchinson etc. R. Co. v. Sullivan, supra;

Clark v. Pidgeon River Improvement etc. Co., supra;

Walla Walla v. Walla Walla Water Co., supra.

In these cases it is held that the remedy at law must be as prompt and as speedy as in equity.

Therefore, if this court holds there is a multiplicity of suits, appellants are entitled to their injunction on this ground. If, on the other hand, this court holds there is no multiplicity of suits involved, then injunctions should issue because appellants then have no adequate remedy at law. If this court holds that appellants are not required to wait four years to sue, then this court is involving the parties hereto in a multiplicity of suits.

It is respectfully submitted that there is no other decision available as a decision that there is no multiplicity of suits and that there is an adequate remedy at law would be, we submit, contrary to the unbroken line of authorities.

Fisher Flour Milling Co. v. Vierhaus Is Not Decisive of These Cases.

The above case decided by this court August 15, 1935 is in no wise binding upon this court.

It has been repeatedly decided by the courts that general expressions in an opinion are to be considered relative to the case in which they are used and particularly in relation to the facts presented to the court. In a subsequent case, wherein the facts are dissimilar, the first case would not be binding.

We quote from only a few of an unbroken line of decisions which we believe will compel this court to hold that the *Fisher* case is not in point.

In *Cohens v. Virginia,* 6 Wheat. 398, the court said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Weyerhauser v. Hoyt,* 219 U. S. (55 L. ed.) 393, it is said:

> "If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohen v. Virginia, 6 Wheat. 399, 5 L. ed. 290, so often since reiterated and expounded by this court."

In the case of *Northern National Bank v. Porter Township,* 110 U. S. (28 L. ed.) 258-260:

> "It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this Court said in Cohens v. Virginia (the Court then quotes from that opinion . . ."

In *Daviess, et al. v. Fairbairn, et al.,* 3 How. (11 L. ed.) 760-766 it was said:

> "The attention of the court was not drawn to any other point than the one before them. They did not say that that part of the Act of 1776 which regulates the acknowledgment of a *feme covert,* which is wholly different from the above was repealed. It is true their language is general, but their meaning must be limited to the point under consideration. This decision, therefore, cannot be considered as having a bearing on the point now before us."

In the case of *Parsons v. District of Columbia,* 170 U. S. (42 L. ed.) 943-946, it is said:

> "In each case, therefore, where the party, whose property is subjected to the charge of a public burden, challenges the validity of the law under which it was imposed, it becomes the duty of the courts to closely consider the special nature of the tax and legislation complained of.
>
> It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable to another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict, than that which deals with the taxing and police powers."

In *Alexander v. Baltimore Ins. Co.,* 4 Cranch (2 L. ed.) 370 ,it is said:

> "It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best inexplicitly stated, as establishing important law principles."

In *Hans v. State of Louisiana,* 134 U. S. (33 L. ed.) 1, the court said:

> "It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial,* and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."

It is said in the case of *Northern P. R. Co. v. North American Telegraph Co.,* 230 Fed. 347, that

> "An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different."

In the Supreme Court of Virginia in the case of *Payne v. Jennings,* 144 Va. 126, decided in 1926, speaking of this rule the court says:

> "It is a rule of construction that the opinion of an appellate court must be construed in the light of the facts in the particular case."

Of the grounds here presented to this court in these applications, only one was before this court in the *Fisher* case, namely, criminal liability for nonpayment of the tax.

We present none of the other three grounds which the appellants therein relied on for injunction. Our grounds for such relief are totally different.

In the *Fisher* case, they allege the threat of legislation as affecting their remedy at law. We allege enacted legislation now in effect as affecting our remedy at law. They allege multiplicity of suits between them and their

customers. We allege multiplicity of suits between the same parties to this action. They allege the threat of their customers refusing to pay the amount of the processing tax to them. We allege that we have not, can not and do not pass the tax on, but absorb it.

Appellants have also alleged the threatened destruction of their business, the rendering valueless of their property, their inability to recoup their losses because of the inability of defendant to respond to a money judgment. We allege facts showing inadequacy of the remedy at law hereinabove set out. We allege facts showing that appellants will suffer great and irreparable damage and injury if the injunctions are not granted.

All these facts are before this court for the first time. They were not present in the *Fisher* case.

Further, there is before this court for the first time the effect of the amendments, now enacted in the law, to the Agricultural Adjustment Act.

Further, as stated in 7 *R. C. L.* 1005—

> "The doctrine of *stare decisis* is based upon the assumption that the rule of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the question involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the court of last resort." Citing *Calhoon Gold Min. Co. v. Ajax Gold Min. Co.,* 27 Colo. 1; 83 A. S. R. 17; 5 L. R. A. 209.

There is a diversity of decisions on this important questoin among the Circuit Courts. The Circuit Courts for the Second and Tenth Circuits have granted just such injunctions as this court denied in the *Fisher* case. The U. S. District Court for the District of Maryland in the case of *Gebelein v. Milbourne, supra,* after an exhaustive trial has granted a permanent injunction on the same set of facts as here presented, save only for the introduction here of the aforesaid amendments. There is pending in the Supreme Court at least one case and there will be others, we are informed, dealing with the issues here involved. Therefore, under authority of the above R. C. L. quotation, the *Fisher* case has no binding effect here whatsoever.

And, lastly, as stated in *Miller v. Nut Margarine Co., supra,* each case for injunction must stand on its own merits. No hard and fast rule can be laid down.

Conclusion.

In conclusion, appellants submit that they have shown that there is at least serious doubt as to the constitutionality of the Agricultural Adjustment Act; that there is no adequate, plain, speedy, prompt, full, complete and efficient remedy at law; that there is a multiplicity of suits involved; that unless the injunctions are granted, appellants will suffer irreparable injury and damage, have their property and property rights rendered valueless, have many repeated trespasses committed against them by appellee and be unable in any manner to recoup their losses.

Upon the facts alleged in our complaints and the points herein made and authorities herein cited, appellants respectfully submit and contend that they are entitled to the issuance of a preliminary injunction as prayed for in their complaints.

Respectfully submitted

CLAUDE I. PARKER,

RALPH W. SMITH,

J. EVERETT BLUM,

Solicitors and Counsellors for Appellants.